SUPREME COURT, U. S.

AUG 7 1967

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 461

HARDY SALT COMPANY,
Petitioner,

vs.

STATE OF ILLINOIS et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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August 4, 1967.

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Hardy Salt Company, petitioner, prays that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on May 22, 1967.*

* Plaintiffs in the District Court, respondents here, are the State of Illinois, the Illinois State Toll Highway Commission and the State of West Virginia, its agencies and subordinate municipalities. No longer in either of the actions here sought to be reviewed are the other defendants: Morton International, Inc. (Successor to Morton Salt Company) International Salt Company, Diamond Crystal Salt Company, Cargill Salt Company, American Salt Company and Cayuga Salt Company.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court (R. Vol. I, p. 99) printed in Appendix B hereto, *infra*, p. 22, is reported at 259 F. Supp. 35. The opinion of the Court of Appeals for the Eighth Circuit (R. Vol. II, Supp. p. 1) printed in Appendix A hereto, *infra*, p. 7, is reported in ... F. 2d ....

JURISDICTION.

The judgment of the Court of Appeals affirming the order of the United States District Court for the District Court of Minnesota was entered on May 22, 1967 (R. Vol. II, supp. p. 17). The jurisdiction of this Court is invoked pursuant to the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 928, § 1254.

QUESTION PRESENTED.

Did the tolling provision of § 5 (b) of the Clayton Act which suspends the running of the statute of limitations during the pendency of government anti-trust proceedings and for one year thereafter toll the statute as to petitioner, a party named as co-conspirator but not as a defendant, in the government litigation.

STATUTES INVOLVED.

The statutes involved are § 4B of the Clayton Act, c. 283, § 1, 69 Stat. 283, 15 U. S. C., § 15 (b) and § 5 (b) of the Clayton Act, c. 283, § 2, 69 Stat. 283, 15 U. S. C., § 16 (b). The texts of those statutes are set forth in Appendix C hereto, *infra*, p. 54.

STATEMENT OF THE CASE.

On June 28, 1961, a grand jury sitting at St. Paul, Minnesota, returned an indictment in the United States District Court for the District of Minnesota, charging certain rock salt producers with violations of the anti-trust laws in the sale of salt to states, counties and municipalities for ice control purposes (R. Vol. I, p. 3). On July 11, 1961, the United States filed a civil complaint in the District Court for the District of Minnesota which alleged the same charge (R. Vol. I, pp. 4, 13-21). Named as defendants in each of said actions were Morton Salt Company, International Salt Company, Diamond Crystal Salt Company and Carey Salt Company (R. Vol. I, pp. 3, 4, 14). The government, in each of the actions, named American Salt Company, Barton Salt Company, Cargill, Inc., Cutler-Magner Company and Hardy Salt Company, petitioners here, as co-conspirators (R. Vol. I, pp. 3, 4, 15). No alleged co-conspirator was ever served with process in either the civil or criminal case and none ever entered an appearance therein or participated in the proceedings.

The criminal case was tried to a jury in the District Court for the District of Minnesota and resulted on June 7, 1962, in a verdict of not guilty (R. Vol. I, p. 5). Thereafter, Judge Nordbye entered an injunction adverse to Morton Salt Company and Diamond Crystal Salt Company in the civil case, which decree was affirmed in this Court on October 25, 1965, 382 U. S. 44 (R. Vol. I, p. 10). During the pendency of the civil action and prior to the District Court decree therein, International Salt and Carey Salt Company had entered into consent decrees (R. Vol. I, pp. 4, 6).

On October 13, 1964, the State of Illinois filed its first treble damage action against those four salt producers

who were the named defendants in both the criminal and civil actions brought by the United States (R. Vol. I, pp. 7, 57).

On August 23, 1966, the State of Illinois commenced its second (the instant) action against two additional rock salt producers and one rock salt distributor, petitioner, none of whom were parties to the earlier action brought by the State of Illinois or to either of the Federal government actions (R. Vol. II, pp. 3-12). The complaint filed in the District Court invoked the jurisdiction of that court under § 1 of the Sherman Act, c. 647, § 1, 26 Stat. 209, 15 U. S. C., § 1 and §§ 1, 4, 5, 12 and 16 of the Clayton Act, c. 323, §§ 1, 4, 5, 12 and 16, 38 Stat. 730, 731, 736 and 737, 15 U. S. C., §§ 12, 15, 16, 22 and 26 (R. Vol. II, p. 14). The same day the State of West Virginia filed its first treble damage action joining as defendants the four producers who were named as defendants in both government actions and the two additional companies including petitioner. The complaints filed by each of the states allege conspiracies extending through 1961, a date more than four years prior to the filing of said complaints (R. Vol. II, pp. 6, 18).

Petitioner moved to dismiss each of the actions against it on the ground that the complaint showed on its face that it was barred under the provisions of § 4 (b) of the Clayton Act. (15 U. S. C., § 15 (b), Appendix C, *infra*, 54) (R. Vol. II, pp. 25, 27).

To avoid the bar of the statute of limitations, respondents had pleaded the existence of governmental actions which actions had not terminated until less than one year prior to the filing of the actions here challenged and therefore were protected by the tolling provisions of § 5 (b) of the Clayton Act, 38 Stat. 731, 69 Stat. 283, 15 U. S. C., § 16(b) (R. Vol. II, pp. 9, 21).

In the instant proceedings the trial judge concluded that the pendency of the civil litigation had tolled the action as to Hardy. It overruled Hardy's motions to dismiss (R. Vol. II, pp. 29-31).

The trial court, pursuant to § 1292 (b) of the Judicial Code, 28 U. S. C., certified the question of the plea of limitations to the Court of Appeals for the Eighth Circuit (R. Vol. II, p. 30).

The Court of Appeals for the Eighth Circuit affirmed the order of the District Court (Vol. II, supp. p. 17).

REASONS FOR GRANTING THE WRIT.

The opinions in this case are the only reported decisions which hold that § 5 (b) of the Clayton Act suspends the running of the statute of limitations to one who is not a party in the governmental action to enforce the anti-trust laws. The opinion and judgment of the Court of Appeals sought to be reviewed conflict with the opinion and judgment of the Court of Appeals for the Seventh Circuit in *Sun Theatre Corporation v. RKO Radio Pictures, Inc.*, 213 F. 2d 284, 292 (1954), and the decision of the Court of Appeals for the First Circuit in *Momand v. Universal Film Exchange, Inc.*, 172 F. 2d 37, 48 (1948), cert. denied 336 U. S. 967.

The decision of the district court in the instant case which was affirmed by the Court of Appeals is contrary to the opinions of the District Court for the District of Utah in *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446, 455 (1951), the District Court for the Northern District of California in *Levy v. Paramount Pictures, Inc.*, 104 F. Supp. 787, 789 (1952), the District Court for the Western District of Missouri in *Electric Theatre Co. v. 20th Century-Fox F. Corp.*, 113 F. Supp. 937, 945 (1953), and the District Court for the Southern District of New York in *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747, 761 (1953).

The decisions of the District Court and the Court of Appeals in the instant case purport to be based on the decisions of this Court in *Minnesota Mining v. New Jersey Wood F. Co.*, 381 U. S. 311 (1965), and *Leh v. General Petroleum Corp.*, 382 U. S. 54 (1965). Neither of those cases, however, involves the question presented for review here.

The question is one of continuing importance in the administration of the anti-trust laws of the United States. Subsequent to the decision of the District Court in the instant case but before judgment was rendered by the Court of Appeals, the District Court for the District of New Jersey in *The State of New Jersey v. Morton Salt Company, et al.*, Civil No. 687-65, rendered a decision and judgment contrary to that of the District Court and the Court of Appeals here. That decision and order have been appealed to the Court of Appeals for the Third Circuit, being Causes Nos. 16,397, 16,398, 16,399, 16,517, 16,518 and 16,519 in that court. Briefs have been filed and the appeal is scheduled for oral argument in that Court in the early fall of 1967.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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August 4, 1967.

APPENDIX